United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7341

United States Court of Appeals
FOR THE SECOND CIRCUIT

ARISTEDES A. DAY, THEODORA DAY and CONSTANTINE DAY, individually and ARISTEDES A. DAY and THEODORA DAY parents of CONSTANTINE DAY,

Plaintiffs-Appellees,

against

TRANS WORLD AIRLINES, INC.

Defendant-Appellant.

KATE KERSEN, individually and as Administratrix and Administratrix Ad Prosequendum of the Estate of Elbert Kersen, deceased,

Plaintiff-Appellee,

against

TRANS WORLD AIRLINES, INC.

Defendant-Appellant.

JOHN SPIRIDAKIS, BESSIE SPIRIDAKIS, LEONARD LAZARUS, SHIRLEY LAZARUS, ARNOLD ROSE and HELEN ROSE,

Plaintiffs-Appellees,

against

TRANS WORLD AIRLINES, INC.

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUE

The sole issue presented on this appeal is whether plaintiffs have a claim in absolute liability against TWA under the terms of the Warsaw Convention as modified by the Montreal Agreement. Considering the Convention's purposes, its legislative history and its uniform interpretation, had the Convention commenced to apply where plaintiffs' alleged injuries admittedly took place while they were still inside the physical boundaries of the terminal building.

III

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an Appeal from an Order granting plaintiffs' motion for summary judgment on the issue of liability in three similar cases and denying the motions of defendant Trans World Airlines, Inc. ("TWA") for summary judgment dismissing the claims. The District Court held TWA absolutely liable for injuries to plaintiffs pursuant to Article 17 of the Warsaw Convention, a treaty of the United States, as modified by the Montreal Agreement, even though the plaintiffs were inside the airline terminal building, over 250 meters away from the plane, when a terrorist attack occurred.

The question before this Court is whether, under the facts of this case, the Warsaw Convention is applicable. This question involves a determination of when the provisions of the Warsaw Convention commence and when they cease to apply. Under Article 17 of the Convention, as modified, an air carrier is absolutely liable, regardless of fault, for death or bodily injuries up to a maximum of $75,000 if the accident causing the damage took place "on board the aircraft or in the course of any* of the operations of embarking or

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*Below, at page 20, is set forth in detail the drafters' reason for including "any." They wanted to make clear that the Convention covered climbing into and out of a plane not only at the beginning and end of a flight but also at any intermediary stops.

disembarking." Whether the drafters of this treaty governing international air transportation intended liability of the carrier under the Convention to apply to passengers inside the terminal building of an airport will be controlling.

Plaintiffs also allege a claim against TWA based in negligence, but that claim was not in issue on the motions below and is not in issue on this appeal.

B. THE PROCEEDINGS BELOW

This action was instituted in 1973 in the United States District Court for the Southern District of New York. By Notice of Motion dated October 30, 1974 plaintiffs moved for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the issue of absolute liability. Defendant TWA opposed plaintiffs' motion and moved for partial summary judgment on its own behalf on the ground that the Warsaw Convention did not apply to plaintiffs who were still inside the terminal building. As stated above, the issue of TWA's alleged negligence was not a part of either of these motions.

In a memorandum decision, dated March 31, 1975, the lower court granted plaintiffs' motion for partial summary judgment on the issue of absolute liability and denied TWA's motion. The district court stayed further

proceedings in the case and certified the question for purposes of an interlocutory appeal under 28 U.S.C. § 1292.

On April 28, 1975 defendant TWA duly petitioned this Court for permission to appeal pursuant to 28 U.S.C. §1292(b), and on May 9, 1975 this Court granted TWA's petition.

C. FACTS

This action arose out of a sudden armed attack which took place inside the East Terminal Building ("the Terminal Building") of Hellenikon Airport, Athens, Greece. Hellenikon Airport ("the Airport") is owned by the Greek Government and is under the sole management of the Greek Civil Aviation Department, an arm of the Greek government (A 82)*.

The Terminal Building

The Terminal Building has two levels. The entrance, on the upper level, leads to a large hall which contains the sales, information, and check-in counters for all 40 foreign airlines with international flights out of the Airport (A 85). (The floor plan of the Terminal Building is at page 87a of the appendix.) The check-in counters for persons with tickets are

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*Numbers preceded by the letter "A" in parentheses refer to pages of the Appendix.

located not far from the sales counters (A 85). There, tickets are submitted, baggage is checked, and an airport head tax is paid (A 85). Beyond these counters is a control point administered by the Greek authorities for passport inspection and currency control (A 85). Steps lead down into the Transit Lounge from this control point (A 85).

The Transit Lounge

The Transit Lounge is a large room on the lower level of the Terminal Building where all persons scheduled to depart on international flights of the 40 scheduled carriers using the terminal wait for their flights to be called (A 86). (The floor plan of the Transit Lounge is at page 87b of the appendix.) The Transit Lounge contains a bar and duty free shops, and persons in the lounge are free to move about at their leisure (A 86). Prospective passengers of any of the 40 airlines which use the lounge may walk or sit in any part of the Lounge they please since there are no areas which are used exclusively by prospective passengers of any particular airline (A 86).

Also in the Transit Lounge is the transfer desk used by all prospective passengers where seat assignments for each flight are made (A 86). After a flight is called, males and females are separated into two lines at the appropriate gate and both their persons and any hand luggage they are

carrying are thoroughly searched by the Greek authorities (A 86). After being searched, one proceeds through two sets of exit doors, walks across a terrace, goes down a set of stairs, and walks onto a roadway at the level of the traffic apron (A 87). From there, one is shuttled by an Olympic Airways bus to the area on the traffic apron where the plane is parked, a distance of approximately 250 meters (A 79, A 87c). When the bus stops near the plane, one merely walks a few steps to the boarding ladder and up the ladder and into the plane (A 87).

The Attack

At approximately 3:00 P.M., Athens local time, on August 5, 1973, plaintiffs, who intended to take TWA's flight 881 to New York, were in the Transit Lounge lined up at the government inspection area near gate 4 for a hand baggage check and physical search at the gate by Greek police (A 84). At about 3:10 P.M., three grenades were thrown in rapid succession and exploded in the immediate vicinity of plaintiffs (A 84). These explosions were followed by several shots from firearms (A 84). The attack was perpetrated by two terrorists, who had apparently mistaken plaintiffs for other people taking a flight to Israel immediately prior to the departure of flight 881. As a result of this attack, plaintiffs allege various injuries.

None of the plaintiffs had left the Transit Lounge at the time of the attack. All of the plaintiffs were inside of the terminal building, over 250 meters distant from the aircraft (A 79, A 87c).

THE WARSAW CONVENTION

The Warsaw Convention, more formally known as the Convention for the Unification of Certain Rules Relating to International Transportation By Air, 49 Stat. 3000, T.S. No. 876 (1934), was written in 1929 and adhered to by the United States in 1934. The Convention was drawn up and debated on in French and the official French version is printed at 49 United States Statutes at Large pages 3000-3013. The purposes of the Convention were to limit the liability of air carriers in international transportation and to provide uniform rules of recovery for passengers throughout the world. Having established that the carrier would be liable to its passengers under prescribed conditions regardless of (and sometimes contrary to) local law, the Convention, in Article 22(1), established a maximum liability on the part of the carrier of approximately $8,300. In addition to establishing a maximum ceiling on liability under the Convention, the period of

carriage and the type of injury were limited by Article 17, which provides as follows:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking" (emphasis added).

A passenger benefited, therefore, from a presumption that the carrier was liable. This presumption might be rebutted if the carrier could prove, pursuant to Article 20(1), that it had taken "all necessary measures to avoid the damage." Due care, therefore, was a complete defense.

THE HAGUE PROTOCOL

By the 1950's the Convention had become dated with respect to the monetary limitation of $8,300. There were some who felt that the ceiling on damages should be raised considerably. As a result, a diplomatic conference was held at The Hague in 1955. Certain amendments to the Warsaw Convention, such as raising the limit of the carriers' liability under Article 17 to $16,600, were discussed and incorporated into a protocol. Although these amendments were adopted by several nations, the United States did not ratify the protocol.

As a result of the dissatisfaction over the Warsaw limit of liability, even as increased by The Hague Protocol, the United States formally denounced the Warsaw Convention on November 15, 1965, with cancellation scheduled to take effect six months later on May 15, 1966. Prior to this latter date, however, TWA and other members of the International Air Transport Association ("IATA") entered into The Montreal Agreement, and the United States withdrew its denunciation of the Convention.

THE MONTREAL AGREEMENT

The Montreal Agreement effected a compromise between the airlines and those nations which would stand by the Warsaw Convention as it was originally written (and/or modified by the Hague Protocol), and the United States, which was prepared to withdraw from the Convention. Actually, the Montreal Agreement is a contract among most of the international air carriers made with the approval of the Civil Aeronautics Board. (C.A.B. Agreement 18900, Order E-23680, May 13, 1966.) Under the Montreal Agreement, the terms of the Warsaw Convention are fully applicable with two exceptions: (1) the monetary limitation of $8,300 was raised to $75,000, and (2) the defense of due care provided by Article 20(1) was waived.

It must be emphasized that the whole Convention, including Article 17, was incorporated into the Montreal Agreement. The drafters of Montreal did not intend to make and did not make any changes in the text of the international treaty. The treaty itself in Article 22(1) provided for an agreement of "a higher limit of liability." What was done was to increase the limit to $75,000 and waive the defense of due care in Article 20(1). The rest of the Convention with its long legislative history and judicial interpretation remained unchanged. For example, while the airlines could not defend on the theory of their own due care, the defense of a passenger's contributory negligence remained available and unchanged under Article 21.

ARGUMENT

Summary of TWA's Position

Plaintiffs are seeking recovery on the basis of (1) a claim in negligence, and (2) a claim based on the absolute liability provision of the Warsaw Convention, as modified by the Montreal Agreement. The negligence claim is not in issue in these partial summary judgment motions. To recover under the Warsaw claim, plaintiffs must show that their injuries were caused by an accident which took place "on board the aircraft or in the course of any of the operations of embarking or disembarking," as that phrase is understood in Article 17 of the Convention.

Since plaintiffs contend in this action that their injuries are in fact covered by Article 17, they must argue that all procedures prior to the actual boarding of the plane by the passengers are "operations of embarking." By so doing, plaintiffs are asking this Court to apply the Warsaw Convention to an injury which occurred inside the terminal building long before they actually commenced boarding the aircraft or even were out on the traffic apron.

Such an interpretation would be against the clear intent of its drafters as evidenced not only by the legislative history and underlying policy of the Convention but also by subsequent uniform interpretation by noted aviation scholars the world over. It is also contrary to all case law, including decisions from the highest court in France and the U.S. Court of Appeals for the First Circuit.

POINT I

THE DRAFTERS OF THE WARSAW CONVENTION SPECIFICALLY INTENDED TO EXCLUDE ACCIDENTS OCCURRING INSIDE THE TERMINAL BUILDING

The legislative history of the Warsaw Convention shows that it was the intent of the parties to exclude accidents taking place inside terminal buildings.

It is the well established practice of the courts in this country to look to the legislative history of a treaty to arrive at its correct interpretation. Choctaw Nation v. United States, 318 U.S. 423 (1943); Factor v. Laubenheimer, 290 U.S. 276 (1933); Cook v. United States, 288 U.S. 102 (1933).

Indeed, a federal court has stated specifically with regard to the Warsaw Convention that "the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention." Block v. Compagnie Nationale Air France, 386 F.2d 323, 336 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).

Legislative History

Preparatory work for the Warsaw Convention, including the formulation of draft articles, was begun at the first Conférence Internationale de Droit Privé Aérien held in Paris in October of 1925. The Paris Conference appointed a commission of experts in international air law, the Comité International Technique d'Experts Juridiques Aériens ("C.I.T.E.J.A."), which was charged with studying and suggesting changes in the draft articles presented at the Paris

Conference. After several years of study, C.I.T.E.J.A. adopted a final version of a draft convention at its meeting in Madrid in May of 1928. It was this draft, frequently referred to as the "C.I.T.E.J.A. draft," that was before the delegates as they met in Warsaw in October, 1929 to draw up the final Convention.

The C.I.T.E.J.A. draft, in its article 20 (ultimately to become Articles 17 and 18 of the Convention), would have allowed liability under the Convention to attach while passengers as well as goods and baggage were in the terminal building. Significantly, this draft article made no distinction between passengers and baggage.

> "The period of carriage for the application of the provisions of the present chapter, extend from the time when the passengers, goods or baggage enter the airport of departure until the time when they exit from the airport of arrival; it does not cover any carriage whatsoever outside the limits of an airport, other than by aircraft." (Translation from the French*; article 20, para. 1 of C.I.T.E.J.A. draft, II Conférence Internationale de Droit Privé Aérien, 4-12 October 1929, (Warsaw, 1939) at 171)) ("Warsaw Minutes").

While the delegates at Warsaw had little trouble agreeing that liability should attach inside the terminal building in the case of goods and baggage, the Warsaw Minutes show that there was extensive debate on the principle as

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* All translations herein have been certified as true and correct by Michael Riffaterre, Professor and Chairman of the Department of French and Romance Philology at Columbia University (A 90).

regarded passengers. In this connection, the New York State Court of Appeals has recently noted that "[t]he minutes of the Convention indicate that the debate over this article [17] centered around the issue of when the air carrier's liability for damage to passengers should begin and end rather than the scope of compensable injuries." Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 395n.10, 314 N.E.2d 848, 854n.10, 358 N.Y.S.2d 97, 105n.10 (1974).

During the debate at the convention on this issue, the very situation involved in this case was discussed by the delegates. The position advanced here by plaintiffs, that the Convention applies to persons inside the terminal building, which was that provided for in the C.I.T.E.J.A. draft article, was carefully considered, voted on, and specifically rejected by the delegates.

The Reporter of the Warsaw convention, Mr. Henry De Vos of Belgium, supported draft article 20 and defended its language in his report of September 25, 1928 on the C.I.T.E.J.A. draft, made on behalf of C.I.T.E.J.A. to the Warsaw delegates. In that report, Mr. De Vos argued that even though draft article 20 made the Convention applicable inside the terminal building, the carrier would be able to

escape liability because pursuant to another article "the carrier will be able to establish that he is not at fault and that he has taken all necessary measures to avoid the damage or that it was impossible for him to take them, particularly because the airport was placed under an authority other than his own." (Translation from the French; Rapport par M. Henry De Vos, Warsaw Minutes at 164.) Later, at the conference itself, Mr. De Vos reiterated his position but was promptly challenged by the Brazilian delegate, Mr. Peçanha, who showed the fallacy of this argument by pointing out that the other article referred to by Mr. De Vos related only to the burden of proof and would not change the fact that draft article 20 covered accidents in the terminal. (Warsaw Minutes at 56).

Mr. Peçanha was the leader of the opposition to the principle that liability would attach upon a passenger inside the terminal building, and he strongly urged rejection of draft article 20. He asked his fellow delegates: "Can one hold the carrier liable for the life of a passenger before he has embarked on the aircraft? How many accidents can arise within the boundaries of an airport before departure has taken place?" (Warsaw Minutes at 49).

When the President of the conference, Mr. Lutostanski of Poland, eventually called for a vote on the issue of passenger liability, the C.I.T.E.J.A. draft article, providing

for attachment of liability from the time passengers "enter the airport of departure until the time when they exit from the airport of arrival," was voted on and specifically rejected by the delegates. (Warsaw Minutes at 57).

Upon rejection of the principle proposed in the C.I.T.E.J.A. draft, the article was sent back to the drafting committee to conform the Convention language to the vote taken by the delegates.

The final text of the Convention shows that the drafters did not intend that liability to passengers attach inside the terminal building. Mr. Ripert, the French delegate, stated that the delegates would never succeed in "providing for both the carriage of goods and the carriage of passengers in the same phrase," and he proposed that draft article 20 be split into two separate articles. (Warsaw Minutes at 49, 50). The result was the adoption by the conference of Article 17 (for passengers) and Article 18 (for goods and baggage) (Warsaw Minutes at 136).

Article 18, relating to goods and baggage, maintained the basic system provided for in draft article 20, namely that liability of the carrier could attach inside the terminal building.

Article 18

"(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever." (Emphasis added).

Article 17, relating to passenger liability, however, was specifically drafted to reflect a more limited application of the treaty to passengers. Airlines would not be liable to passengers while the passengers were still inside the terminal building. Instead, in accordance with the prevailing view of the delegates at the convention, liability would not attach until a passenger had left the terminal building and was actually walking up the boarding ladder of the airplane.

Article 17

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The distinction the drafters of the Convention desired to make between passengers on the one hand, and

goods and baggage on the other, is readily apparent. Amadeo Giannini, Italian delegate to the Warsaw conference and chairman of the drafting committee, later wrote about the effect of having adopted "on board the aircraft or in the course of any of the operations of embarking or disembarking" as the limiting language for passengers:

> "In this way, the grave and unjustifiable rule proposed by C.I.T.E.J.A. to have liability commence at the moment of entry into or exit from, respectively, the airport of departure or arrival, is eliminated." (Translation from the Italian; Giannini, Saggi di Diritto Aeronautico, p. 233 (1932).

In fact, Dr. Otto Riese, German delegate to the Warsaw conference, has made clear that the very situation involved in these cases is not covered by the Warsaw Convention:

> "The Warsaw Convention excludes, therefore, those accidents having taken place in the course of operations prior to embarking and subsequent to disembarking, to wit, in particular, during the period of the passenger's traveling from the city terminal to the airport, and while he is in the airport terminal buildings." (Translation from the French; Riese and Lacour, Précis de Droit Aérien, p. 265 (1951) (emphasis added)).

Plaintiffs here would now have a United States court disregard and decide contrary to the clear intentions of the drafters of an international treaty to which the United States has long been a party. This Court should not permit itself to entertain such a course of action.

Subsequent Discussion of Article 17

Subsequent discussion of Article 17 between delegates to the Warsaw conference and other recognized air experts indicates that there was, in fact, disagreement as to the precise meaning of the words "any of the operations of embarking or disembarking." This disagreement, however, centered only on whether Article 17 included a passenger's actual climbing into or out of the aircraft or whether it also extended to accidents occurring out on the traffic apron. No authority found has ever suggested that Article 17 could ever apply to an accident occurring inside the terminal building.

At the Cinquième Congrès International de la Navigation Aérienne (Fifth International Congress on Air Navigation) held at The Hague in September of 1930, D. Goedhuis, later President of The Hague Convention, presented a paper to the Legal Section in which he proposed amending Article 17 to clear up this ambiguity:

> "Further, art. 17 mentions 'embarquement' and 'debarquement'. The question is how to explain these words? There are two views viz: a) in a broad sense: i.e. the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building; b) in a narrow sense, i.e.: the getting on board and the alightment only comprise the actual getting in and out of the aeroplane." (D. Goedhuis,

Observations Concerning Chapter 3 of the Convention of Warschau 1929, Cinquième Congrès International de la Navigation Aérienne, 1-6 Septembre 1930 (The Hague 1931) at 1163-4) ("Fifth Congress").

Mr. Goedhuis presented his paper in English, but the discussion which followed was in French. During this discussion, Mr. Goedhuis said he favored "a broad interpretation of the words 'embarking' and 'disembarking', also to cover passengers going from the terminal building to the plane and vice versa." (Translation from the French; Fifth Congress at 1172).

Others present, including Dr. Wolterbeek-Müller, president of the Congress' Legal Section and Dutch delegate to the Warsaw conference, claimed on the other hand that the proper interpretation was the "narrow" view, or the time when the passengers were actually boarding the aircraft. (Translation from the French; Fifth Congress at 1173).

At this point it should be noted that the word "any" appearing in the phrase "any of the operations of" was inserted by the drafters merely to insure that the Convention would cover a trip involving more than one stop. As Goedhuis writes:

> "[T]he minutes of the meetings of the C.I.T.E.J.A. bring out that one did not want to consider only embarking or disembarking at the aerodrome of departure and of destination, but also the operation during a stop en cours de route. For that reason 'during any operations' was used in article 17." (D. Goedhuis,

National Airlegislations and the Warsaw Convention, p. 196 (1937) (emphasis in original)).

From the discussions held at the Fifth Congress, therefore, it is clear that the broadest possible interpretation one can legitimately give to Article 17 is one which would extend the period of liability to include those accidents occurring out on the traffic apron in addition to those occurring during a passenger's actual climbing into or out of the aircraft.

It is worthy of note that several countries have actually expressly opted by way of official act for the "narrow" interpretation of Article 17. The Scandinavian Acts implementing the Convention, and the German Government translation both indicate that the period of liability is limited to the actual mounting into and alighting from the aircraft. (H. Drion, Limitation of Liabilities in International Air Law, p.83 (1954)).

In any event, this Court is not required to make a choice here between the "broad" or "narrow" interpretation of Article 17. Under either interpretation, the terminal building is excluded from coverage under Warsaw, as was the express intention of the Convention's drafters.

POINT II

AUTHORITIES THE WORLD OVER UNIFORMLY SUPPORT TWA'S POSITION THAT THE WARSAW CONVENTION DOES NOT APPLY TO ACCIDENTS OCCURRING INSIDE THE TERMINAL BUILDING

All authority dealing with Article 17 of the Warsaw Convention uniformly interprets this Article to exclude from coverage under the Convention those accidents occurring inside the airport terminal building.

This authority includes not only United States case law, but also the case law of France as determined by that country's highest court interpreting a treaty written in its own language. It also includes numerous treatises by both American and foreign text writers. When construing the Convention this Court should give great weight to the decisions of other nations because uniformity of law was a primary purpose of this treaty.

The Principle of Uniformity

Uniform solutions to the problems encompassed by the Convention were constantly sought during the negotiations of the terms of the Warsaw Convention. Sir Alfred Dennis of Great Britain went so far as to state that "the only reason to enter this convention is a desire to achieve uniformity" (Warsaw Minutes at 25). He went on to point out later that the goal of the Convention was "to achieve

uniformity in the law" (Warsaw Minutes at 44). Mr. Ripert of France pointed out that "we really want to achieve unity in law in the interest of commercial transportation" (Warsaw Minutes at 60).

Drion, a recognized expert on the Warsaw Convention, urges that:

> "Whenever the Convention offers a guidance that 'guidance' should be followed rather than that of any national law in order to safeguard the uniformity aimed at by the Convention" (Drion, Limitations of Liability in International Air Law, p. 120 (1959)).

When the United States adhered to the Convention in 1934, it clearly recognized the significance of uniformity to the framers. Secretary of State Hull's letter to the President, recommending adherence to the Convention, pointed out that:

> "The framers of the Warsaw Convention were, of course, confronted with the necessity of taking into consideration the various legal systems and practices in different countries, and in the interest of obtaining uniformity with respect to international air regulations, compromises were undoubtedly necessary" (1934 U.S. Aviation Reports at 243).

The Civil Aeronautics Board has stated that the Convention "creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation." C.A.B. Order No. E-23680 (May 13, 1966).

As stated by Judge Wisdom in Block v. Compagnie Nationale Air France, 386 F.2d 323, 337-38 (5th Cir. 1967), cert. denied 392 U.S. 905 (1968):

> "A multilatural treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible."

This treaty is now adhered to by over one hundred nations. Divergent solutions between states within the United States or between countries would destroy the concept of a uniform body of law, and a principal objective of the treaty would be defeated. In the event that courts fail to interpret the terms of the Convention uniformly, "the apparent unity of the law falls to pieces." Sand, The International Unification of Air Law, 30 Law and Contemporary Problems 411 (1965).

The initial problem of interpretation of any treaty is determining when the treaty, by its terms, is to apply. For the Warsaw Convention, as regards passenger liability, this involves properly interpreting Article 17. It is important to stress that all authority on this point, both domestic and foreign, uniformly interprets Article 17 to exclude from coverage under the Convention those accidents occurring inside the terminal building.

Case Law

The leading case interpreting Article 17 of the

Warsaw Convention is a French case recently decided by the Paris Court of Appeals and affirmed by the Cour de Cassation, France's Supreme Court. In that case, Maché v. Air France, [1967] Revue Française de Droit Aérien 343, 345 (Cour d'Appel de Rouen 1967), aff'd, [1970] Revue Française de Droit Aérien 311 (Cour de Cassation 1970) (annexed as Exhibit A), the French court, interpreting a treaty drafted and debated in its own language, unequivocally stated that as regards accidents occurring on the ground, the Warsaw Convention does not apply beyond the traffic apron.

In Maché, plaintiff was being led by two Air France stewardesses across the traffic apron from his plane toward the terminal building. Because of construction work, he had to take a short-cut through the customs garden which was not on the traffic apron proper but off to the side and outside of the terminal building. While crossing the customs garden which was on the same level as the traffic apron, and before he even reached the terminal building, plaintiff sustained his accident. In reaching its decision that the Warsaw Convention did not apply to this accident, the court stated:

> "Consequently, if the Warsaw Convention regulates, among others, accidents arising on the ground, in the course of the operations of embarking or of disembarking, it is only to the extent that these operations are taking place on the traffic apron. . . ." (Translation from the French; Maché v. Air France, [1967] Revue Française de Droit Aérien 343, 345 (Cour d'Appel de Rouen 1967), aff'd, [1970] Revue Française de Droit Aérien 311 (Cour de Cassation 1970)).

It is highly significant that the court in Maché found that the operations of disembarking had terminated even before the passenger had entered the terminal building, and even though he was still being led by two Air France stewardesses. Once the passenger leaves the traffic apron, the court said, Warsaw ceases to apply. This result clearly squares with the basic thrust of the Convention -- to provide a ceiling on the air carrier's liability during the period of actual air transportation and to provide uniform rules of recovery when any such liability is incurred.

Thus, the French court in Maché clearly sought to give effect to the purpose of the treaty and the drafters' intent in holding that actual transportation comprises only the period when the passenger is on the traffic apron (where planes are moving about) or is on the aircraft itself.

In another case recently decided in France, Dame Forsius v. Air France, [1973] Revue Française de Droit Aérien 216 (Tribunal de Grande Instance de Paris 1973) (annexed as Exhibit B), a case virtually on all fours with the case before this Court, the French court held that the Warsaw Convention did not apply. In Forsius the plaintiff was injured inside the terminal building at Orly Airport while preparing to leave on an Air France flight for Tunis. She

had entered the terminal building and had gone up to the second floor where she passed through customs and had her travel documents checked. She then entered an area which was restricted to passengers who had already passed through customs and which was utilized in common by numerous different air carriers. It was in this restricted area that Mrs. Forsius sustained her accident.

The injuries in Forsius and in the cases at bar took place in the same area of the respective terminal buildings (Paris and Athens) and the French court in Forsius held that the Warsaw Convention did not apply.

The leading case in the United States interpreting Article 17 of the Warsaw Convention is MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971). MacDonald involved injuries sustained when plaintiff, having completed an international flight, fell down inside the terminal building near defendant airline's baggage retrieval area. The court held that the Convention did not apply:

> ". . . [I]t would seem that the operation of disembarking has terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside of the terminal, even though he may remain in the status of a passenger of the carrier while inside the building. . . . Neither the economic rationale for liability limits, nor the rationale for the shift in the burden of proof, applies to accidents which are far removed from the operation of aircraft." 439 F.2d at 1405 (emphasis added).

In another federal case, Felismina v. Trans World Airlines, Inc., 13 Av. Cas. 17,145 (S.D.N.Y. 1974), it was held that the Warsaw Convention did not apply to an accident which occurred inside the "terminal proper" at JFK International Airport, New York. The plaintiff in Felismina was a passenger aboard a TWA flight from Lisbon to New York. Upon arrival at New York, she disembarked from the aircraft and walked though an expandable, horizontal jetway which led from the airplane door to the "terminal proper." She then walked across a small room on the upper floor of the terminal and was injured as she stepped onto the down escalator leading to the lower level of the terminal where Health and Immigration, baggage claim, and Customs were situated.

After remarking on oral argument that "disembarking" ends once a passenger passes through the door of the terminal, thereby entering the terminal proper, Judge Ward concluded in his written opinion "that by the time plaintiff boarded the down escalator, she had disembarked from defendant's aircraft." Id. Significantly, this was so even though the plaintiff (1) had not yet passed through the federal inspection area, Immigration, Health and Customs, or retrieved any baggage, and (2) was still in an area restricted only to passengers.

It should be noted that the whole area, including

the jetway, the room at the upper level of the terminal and the escalator leading to the federal inspection area - U.S. Health, Immigration and Customs - was completely segregated from the rest of the terminal. Only passengers walking from the same flight with Mrs. Felismina were in the area. Mrs. Felismina was in this segregated area because she had not yet cleared any part of the federal inspection area. Thus, the facts of Felismina are closely analogous to those involved herein, and on those facts the Felismina court found that the Warsaw Convention did not apply.

In a recent case, Klein v. KLM Royal Dutch Airlines, 46 App. Div.2d 679, 360 N.Y.S.2d 60 (2d Dep't 1974), the court unanimously held that the Warsaw Convention did not apply to passengers inside the terminal building. In Klein, the passenger was injured inside the terminal building at Lod Airport, Israel. The unanimous court held:

> "We agree with Sepcial Term, however, that plaintiffs, having gotten off the aircraft and arrived safely within the terminal, had disembarked within the meaning of article 17 of the Warsaw Convention (cf. MacDonald v. Air Canada 439 F.2d 1402, 1405)." 46 App. Div. 2d at 679.

Finally, the very same issue before this Court was recently decided by the District Court for the Western District

of Pennsylvania in Evangelinos v. Trans World Airlines, Inc., Civil Action No. 74 - 165 (W.D.Pa., June 12, 1975) (annexed as Exhibit C), a case arising out of the same incident inside the Athens terminal building. In his opinion holding that the Warsaw Convention does not apply to passengers inside the terminal building under the very facts of this incident, Judge Snyder thoughtfully reviews district court's decision in the case now before this Court on appeal and concludes that the decision does not square with the clear intent of the Convention's drafters as reflected in the Convention's legislative history. As Judge Snyder very aptly points out:

> "The great difficulty with Judge Brieant's opinion. . .is that it extends the liability of the signatories to the Montreal Agreement under the Warsaw Convention far beyond anything that was within the contemplation of the parties." (Exhibit C at p. 13-14)

Thus, both foreign and American courts have uniformly held that Article 17 of the Warsaw Convention does not apply to passengers inside the terminal building.

Text Writers

Text writers from all over the world are unanimous in concluding that the parties did not intend that the Warsaw Convention cover accidents taking place inside the terminal building.

George R. Sullivan, an American, in his study in conjunction with the Air Law Institute, specifically notes that the Warsaw Convention does not apply to accidents occurring in airport lounges, even in cases where they are maintained by the carrier:

> "If the airport waiting-room is maintained by the carrier, is an injury sustained therein by a passenger within the terms of the Convention? The passenger is present there for the purpose of embarkation. But again the purpose of the Convention must be considered; no hazard peculiar to air navigation has been encountered. To permit the air carrier to limit his liability as a waiting-room operator would be a discrimination against every operator of railway or bus passenger stations." (Sullivan, The Codification of Air Carrier Liability by International Convention, 7 Journal of Air Law 1, 20-21 (1936)).

Amadeo Giannini, Italian delegate to the Warsaw conference, has written in his treatise on air law that Article 17 was drafted so as to eliminate having "liability commence at the moment of entry into or exit from, respectively, the airport of departure or arrival." (Translation from the Italian; Giannini, Saggi di Diritto Aeronautico, p. 233 (1932)).

Dutch writers also support TWA's position. D. Goedhuis, President of the Hague Convention, interprets Article 17 to mean that "the operation of embarking begins at the moment when the passenger goes from the airport buildings to the aircraft on the tarmac [traffic apron]; the

operation of disembarking ends at the moment when the passenger enters the buildings of the airport of destination." (D. Goedhuis, National Airlegislations and the Warsaw Convention, p. 193 (1937)).

It should be noted that Goedhuis is arguing here for the "broad" interpretation of Article 17, namely that the period of liability should extend to include a passenger's traversing the traffic apron. As discussed above on pages 20-21, however, several authorities, including Dr. Wolterbeek-Müller, Dutch delegate to the Warsaw convention, have concluded that the "narrow" interpretation is correct and that the period of coverage under the Convention is limited to the passenger's actually climbing into or out of the aircraft. Consequently, writers, including some who were delegates to the Warsaw conference, have subsequently chosen between either the "broad" or "narrow" interpretation, but they uniformly agree that the terminal building is excluded from coverage under the Convention.

Otto Riese, German delegate to the Warsaw conference, unequivocally stated that the Warsaw Convention excludes those accidents having taken place while the passenger "is in the airport terminal buildings." (Translation from the French; Riese and Lacour, Précis de Droit Aérien, p. 265 (1951)).

A Belgian writer on air law, Jean Van Houtte, has

stated his agreement with the interpretation that a passenger in the course of an operation of embarking is one "who, in the execution of the contract of carriage, goes out on the runway to get to his plane or embark on it." (Translation from the French; Van Houtte, La Responsabilité Civile dans les Transports Aériens, Intérieurs et Internationaux, p. 80 (1940) (emphasis in original)).

French writers also support TWA's position. Lemoine writes in his treatise on air law that "one must consider the operation of embarking as beginning from the time when the passenger goes out onto the departure apron and the operation of disembarking as finishing when he leaves the landing apron." (Translation from the French; Lemoine, Traité de Droit Aérien, p. 540 (1947)).

Another French writer, Daniel Lureau, states categorically: "Dominant opinion has the Warsaw Convention apply only for the period of air carriage, that is to say from the time when the passenger leaves the terminal building of the airport to go out on the runway and until the time when the passenger has entered the air terminal of destination." (Translation from the French; Lureau, La Responsabilité du Transporteur Aérien, p. 90 (1961)).

Paul Chauveau, Honorary Dean and Professor of Law at the University of Bordeaux, has also addressed the question of when liability attaches under Article 17 and has

specifically stated that the terminal building was excluded by the drafters of the Convention:

> "[t]he period during which the passenger is in the buildings of the airport was eliminated. . . ." (Translation from the French; Note by P. Chauveau, [1968] D.S. Jur. 517).

In summary, experts on the Warsaw Convention from both the United States and numerous foreign countries, Italy, Holland, Germany, Belgium and France, unanimously support TWA's position that the Convention does not apply to accidents taking place inside the terminal building.

In addition, all relevant case law, including both that of the United States and that of the highest court of France interpreting a treaty written in French, supports TWA's position that absolute liability based on the Warsaw Convention does not extend to persons inside the terminal building.

Since uniformity is a primary purpose of this international compact, the "Court has an obligation to keep interpretation as uniform as possible." Block, supra, 386 F.2d at 338.

POINT III

THE DISTRICT COURT ERRED IN FAILING TO APPLY PROPER RULES OF TREATY INTERPRETATION TO THIS CASE

A multilateral treaty such as the Warsaw Convention

is in reality a contract between the various nations who are parties to it, and a court must seek to give effect to the common intention of the parties. Thus, the primary object of judicial interpretation of treaties is "to ascertain the meaning intended by the parties for the terms in which the agreement is expressed having regard to the context in which they occur and the circumstances under which the agreement was made." Restatement (Second) Of Foreign Relations Law § 146 (1965).

The Legislative History Evidencing The Intent of the Drafters Should Have Been Considered

It is well settled that a court should examine the diplomatic and legislative history of the treaty to ascertain the intent of the parties. Choctaw Nation v. United States, 318 U.S. 423 (1943); Factor v. Laubenheimer, 290 U.S. 276 (1933).

In the case at bar it is obvious that the language in Article 17 of the Convention does not define precisely where the air carrier's liability is to commence and end. In fact, text writers have long been aware of this problem and consequently have had to choose between either the "broad" or "narrow" views outlined by Mr. Goedhuis, both of which, of course, exclude accidents taking place inside the terminal

building. (supra, page 32). For the district court to argue that "the plain meaning of the words 'in the course of any of the operations of embarking produces a single conclusion" (A 116) is patently incorrect. Resort to "plain meaning", therefore, is particularly inappropriate in this case since it is abundantly clear that there is no "plain meaning" that can honestly be given to the phrase in question. United States v. American Trucking Associations, Inc., 310 U.S. 534 (1940).

More Than A Dictionary Must Be Used To Interpret A Treaty

The district court coupled its "plain meaning" analysis with an attempt to arrive at the meaning of the phrase in issue by dissecting the English translation of the phrase and then looking to dictionary definitions of the individual words (A 115-116).

The fallacy of this procedure is obvious and it is respectfully submitted that this Court should reject any such mechanical approach to interpretation of a treaty. Dictionaries are designed to define the broadest possible uses of a word, not to define its meaning in a specific context. It is the meaning of the entire phrase, as it is intended by the parties, rather than the individual words, which is at issue here.

> "To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen . . . ." United States v. American Trucking Associations, Inc. 310 U.S. 534, 542 (1940).

The Policy Of A Treaty Should Be Implemented

Once the intention of the drafters has been established, the court has an affirmative duty to effectuate the purposes of the instrument. Kolovrat v. Oregon, 366 U.S. 187, 198 (1961); Sullivan v. Kidd, 254 U.S. 433 (1920).

As the Supreme Court stated in the leading case of The Amiable Isabella, 19 U.S. [6 Wheat.] 1, 72-73 (1821):

> "This court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality. The doctrine of a performance cy pres, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compact of nations, so far as judicial tribunals are called upon to interpret or enforce them."

Thus, when the contracting parties have, in essence, "stipulated" that accidents inside the terminal building do not fall within the ambit of Article 17, it is not for the court to extend that ambit by implication. Rather:

> "[The court is] to find out the intention of the parties by just rules of interpretation . . . and having found that, our duty is to follow it as far as it goes, and to stop where that stops -- whatever may be the imperfections or difficulties which it leaves behind." Id. at 71.

Notwithstanding these well established principles of treaty interpretation, the district court saw fit to introduce its own notions of "policy" which were clearly never contemplated by the parties to the Convention.

Citing the case of Husserl v. Swiss Air Transport Company, Ltd., 351 F. Supp. 702, 707 (S.D.N.Y. 1972), aff'd per curiam, 485 F.2d 1240 (2d Cir. 1973), the district court advanced the novel theory that the Warsaw Convention "functions to redistribute the costs involved in air transportation" (A 114). However, nowhere in the legislative history of the Convention, nor elsewhere, is there any indication that the Convention was intended to redistribute the costs of air travel, nor did the Husserl court cite any authority for this novel proposition. On the contrary, it has long been recognized that the purposes of the Convention are: (1) the limitation of liability of

the air carrier; and (2) uniformity of interpretation and remedy. Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968); Eck v. United Arab Airlines, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 249 (1964).

Therefore, the district court's novel risk-spreading notion, which, contrary to the intent of the parties as expressed in the legislative history, might impose liability upon the airline for accidents inside the terminal building, is inconsistent with the obligation of a court to implement the purposes of the treaty. Kolovrat v. Oregon, 366 U.S. 187, 188 (1961); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324, 327 (1937).

Moreover, the district court did not stop with the idea of risk-spreading merely during the period of actual air transportation, but stretched this theory to cover the risks of managing an air terminal. In its decision, the district court stated that "[t]he carrier is in a position to negotiate with the owner or operator of an international air terminal to develop security mechanisms to protect air travelers from terrorist attack" and that "[a]irlines are also in a better position to be able to bear the losses incurred as a result of airport violence" (A 114).

In making such assertions, the district court substituted a policy argument of its own predilection. Not only

is there nothing in the Convention or its legislative history to suggest that the drafters considered the airlines to be in a "better position" to bear the losses arising from airport violence, but it is readily apparent that this statement is not correct. It is difficult to see how TWA is in a "better position" in this regard than the Greek government, which owns and manages Hellenikon Airport, or any of the other governments the world over which manage air terminals. In any event, the drafters of the Convention were keenly aware of the possibility of accidents taking place inside the air terminal and expressly decided that the Convention should not apply to them (supra, pages 13-16). If a carrier were to be held liable for an accident inside the air terminal, reasoned the drafters, it should be on the basis of local law.

Common Law Cases Are Inapposite

As support for its interpretation of the Convention, the district court looked to the principles of New York common law as being "instructive for purposes of comparison." (A 121-122) However, common law cases have no relevance to this treaty based on civil law concepts of contract of carriage. As the court stated in Block, supra, 386 F.2d at 336, the Warsaw Convention is "an international convention drawn by continental jurists . . . ." and as stated in American Trust Co. v. Smyth, 247 F.2d 149,

153 (9th Cir. 1957), "[a]ny resort to domestic law must be derived from the express terms of the Treaty itself."

Since the fundamental policy of uniformity underlying the Convention would be destroyed if a court were to resort to contrary local law, neither "New York [n]or any other jurisdiction can redefine the scope or substance of the carrier's liability as it is provided in the Convention." Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 397, 314 N.E.2d 848, 856, 358 N.Y.S.2d 97, 108 (1974) (emphasis added); See, United States v. Belmont, 301 U.S. 324, 331-32 (1937).

Further, the United States did not participate in the drafting of the Convention. The chief reporter of the Convention was French and the overwhelming influence was civil not common law. Under civil law an injured person would have to sue in contract, not tort, and his recovery, even today, could be limited by the terms of the contract where the action is not covered by the Convention. See Maché, supra; Block, supra, 386 F.2d at 331n.22. Thus, American notions of negligence law are inapposite and are not helpful in understanding an agreement grounded on a different legal system.

As Judge Snyder correctly noted in Evangelinos v. Trans World Airlines, Inc., prior to his looking to the legislative history of the Convention to determine the

precise issue here:

> "It is not helpful to look at whether or not the airline would have been liable at common law for injuries or accidents occurring under the circumstances here, as contended for by the Plaintiffs. To the contrary, we look to the Convention." (Exhibit C at p. 9)

SUMMARY

The minutes of the Convention, which trace the evolution of Article 17 from an airport to airport definition to the final limited application, is quite indicative of the parties' intent. This evolution is further dramatized by comparing Article 17 with Article 18, covering baggage, where the broader application of the original C.I.T.E.J.A. draft still applies.

The district court was clearly in error in failing to consider the overwhelming body of international authority demonstrating that the parties never intended the Convention to apply to accidents inside the terminal building.

Most significantly, the observations and analyses by delegates actually present during the drafting of the Convention were not considered at all by the court below. The statement by the German delegate, Dr. Otto Riese, that the Convention excludes accidents which take place while passengers are "in the airport terminal buildings" (supra, page 18) was not examined. Likewise, the statements of

Amadeo Giannini, the Italian delegate (supra, page 18), and Dr. Wolterbeek-Müller, the Dutch delegate (supra, page 20), were not used to arrive at a proper interpretation of the Convention.

In addition, the views of the leading commentators on the Convention were not considered or discussed below. The statements of D. Goedhuis, President of the Hague Convention, Jean Van Houtte of Belgium, M. Lemoine, Daniel Lureau, and Dean Chauveau of France, and George R. Sullivan of the United States, that the Convention does not apply to passengers inside an air terminal, were not mentioned below (supra, pages 31-34). In fact, Dean Chauveau has stated categorically that "[t]he period during which the passenger is in the buildings of the airport was eliminated . . . ." (translation from the French; note by P. Chauveau [1968] D.S. Jur. 517).

Furthermore, the district court did not consider the large body of case law uniformly holding that the Convention does not apply to accidents occurring inside the terminal building. This is error "in the case of this Convention which aims at uniformity of application among its national parties." Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 398, 314 N.E.2d 848, 856, 358 N.Y.S.2d 97, 108 (1974).

Maché, discussed supra at pages 24-26, the only decision from the highest court of any of the many parties to this treaty, was not considered. The United States Supreme Court has relied on the interpretation given a treaty by foreign courts. Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1933).

Likewise, the American cases of MacDonald, Felismina and Klein, discussed supra at pages 27-29, all support TWA's position, but MacDonald and Klein were not even discussed by the district court and Felismina was distinguished "readily" on the grounds that it involved "a claimed disembarking" (A 121).

The fallacy of this classic "distinction without a difference" was aptly seized upon by Judge Snyder in his opinion in Evangelinos:

> "It will be noted, however, that many of the steps involved in embarkation, as outlined by Judge Brieant in Day, are just as essential, although in reverse, to the steps one must take in disembarking. Thus, it is obvious that in disembarking from the plane, passengers must either come down the steps from the plane or go on the jetway to the terminal building. They may then, as was the situation in the instant case, be required to board a bus, but in any event, they would then enter the terminal building and be subjected to inspection by the govenment of entry. At this point, we believe, they must be deemed to be beyond the scope of the carrier's liability." (Exhibit C at p. 14)

It should also be pointed out that in the Forsius case, discussed supra at pages 26-27, the

plaintiff was preparing to embark on a plane from Paris to Tunis, and the French court did not hesitate to hold that the Warsaw Convention did not apply.

Since "the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention" Block v. Compagnie Nationale Air France, 386 F.2d 323, 336 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968), this Court should look to the Convention's legislative history which demonstrates that the parties did not intend for it to apply to accidents inside the terminal building.

CONCLUSION

It is submitted that the Order of the court below should be reversed and partial summary judgment should be granted defendant TWA on the grounds that the Warsaw Convention does not apply to the facts of this case.

Dated: New York, New York
August 13, 1975

Respectfully submitted,

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Exhibit A

COUR D'APPEL DE ROUEN (Aud. Sol.)

(Arrêt du 12 avril 1967)

Maché c. Cie Air France

CHUTE AU SOL D'UN PASSAGER CONDUIT PAR LA PRÉPOSÉE DU TRANSPORTEUR APRÈS ATTERRISSAGE. — JARDIN DE LA DOUANE NE FAISANT PAS PARTIE DE L'AIRE DE TRAFIC. — ACCIDENT SANS RAPPORT AVEC LE RISQUE AÉRIEN. — TRANSPORTEUR TENU D'UNE OBLIGATION DE RÉSULTAT (ART. 1147 C. CIVIL). — OPÉRATIONS D'EMBARQUEMENT ET DE DÉBARQUEMENT SOUMISES A LA CONVENTION DE VARSOVIE. — LIMITATION DE LA RESPONSABILITÉ CONTRACTUELLE. — CONDITIONS GÉNÉRALES DU CONTRAT DE TRANSPORT RAPPELÉES SUR LE BILLET DE PASSAGE ET AFFICHÉES DANS LES BUREAUX DU TRANSPORTEUR. — APPLICATION.

Il résulte des travaux préparatoires que la Convention de Varsovie s'applique aux accidents survenus à terre au cours des opérations d'embarquement ou de débarquement dans la mesure où ces dernières opérations s'effectuent sur l'aire de trafic, c'est-à-dire à un endroit de l'aéroport où les passagers sont soumis aux risques aériens, cessant de s'appliquer lorsque ces risques ont disparu, pour faire place au droit commun des transports terrestres, qui reprend alors son empire.

S'agissant, en l'espèce, de la chute d'un passager au sol, conduit par la préposée du transporteur pour le diriger de l'avion aux bâtiments de l'aérogare où devaient être accomplies les formalités de police et de douane, passager qui n'avait pas la libre disposition de son itinéraire, et la chute étant survenue dans le jardin de la douane à l'extérieur de l'aire de trafic de l'aérodrome, il s'ensuit que cet accident ne peut être soumis au régime de la Convention de Varsovie, mais relève du droit commun des transports terrestres en vertu de la présomption de responsabilité mise à la charge du transporteur qui oblige ce dernier à conduire le passager sain et sauf à destination et à réparer, le cas échéant, entièrement les dommages dont il pourrait être victime, dans la mesure où le contrat de transport lui-même ne l'exonère pas ou ne limite pas sa responsabilité.

Une clause d'exonération et de limitation de responsabilité des conditions générales de transport, à laquelle se réfère le billet de passage, clause dont la validité n'est pas contestée, s'applique non seulement au transport, dans la mesure où celui-ci n'est pas régi par la Convention de Varsovie, mais également à tous autres services annexes, ainsi que cela résulte du libellé même du billet de passage.

La victime d'un pareil accident, survenu à la suite surtout de l'imprudence de la préposée du transporteur qui a emprunté, pour conduire les passagers, un raccourci qu'elle n'avait pas préalablement reconnu, engage la responsabilité de son commettant sur la base de l'article 1147 du Code civil, mais dans la limite de ses conditions générales de transport des passagers, portées à la connaissance de ces derniers tant par les références du billet de passage que par l'affichage du règlement fixant ces conditions, dans les locaux d'émission des billets du transporteur, accessibles au public.

La Cour,

Vu l'arrêt de la Cour de Cassation, Chambre civile, du 18 janvier 1966

qui casse et annule l'arrêt rendu le 29 juin 1963 par la Cour d'Appel de Paris, dans l'instance en dommages-intérêts engagée par Augustin Maché contre la Compagnie Air France, sur le fondement de l'article 1147 du Code civil, à la suite de l'accident corporel dont il a été victime le 29 mars 1958 ;

Vu le jugement du Tribunal de Grande Instance de la Seine du 2 juin 1961 qui a décidé que la Cie Air France était responsable du dit accident, mais uniquement dans les limites prévues à l'article 22 de la Convention internationale de Varsovie du 12 octobre 1939 pour l'unification de certaines règles relatives au transport aérien international et l'a condamné à payer à Maché la valeur de la somme de 125 000 francs, tels que définis par ledit article 22 ;

Attendu qu'il est constant que le 29 mars 1958, Maché a pris place à Orly dans un avion de la Cie Air France ;

Qu'à sa descente de l'appareil sur l'aérodrome de San Bonet, à Palma de Majorque (Espagne), Maché et les autres passagers ont été pris en charge par deux hôtesses de l'air, préposées d'Air France, pour être conduits aux bâtiments de l'aérogare où devaient avoir lieu des opérations de douane et de police ;

Que l'itinéraire normal qui aboutissait à l'entrée principale de l'aérodrome étant impraticable à raison de travaux d'aménagement, il avait été prévu un itinéraire de remplacement lequel contournait le jardin de la douane et empruntait une allée désignée par la lettre B du plan établi par les autorités espagnoles ;

Que la première préposée d'Air France qui marchait en tête du groupe de passagers n'a pas pris cet itinéraire de remplacement, mais un raccourci traversant le jardin de la douane (lettre A du même plan) où des travaux étaient également en cours ;

Que la seconde préposée d'Air France, la demoiselle Guinot Belles, ainsi qu'elle l'a du reste déclaré aux autorités espagnoles le 14 mars 1958, au cours d'une procédure pénale ouverte devant le Tribunal Militaire permanent de Majorque, a suivi ce dernier itinéraire avec le second groupe de passagers parmi lesquels se trouvait Maché ;

Que celui-ci, en traversant le jardin de la douane, a posé le pied sur une dalle en ciment armé qui était en très mauvais état ;

Que sous son poids, la dalle a basculé, entraînant sa chute dans une prise d'eau d'une profondeur de 1 m 20 comportant un enchevêtrement de tuyaux et de robinets ;

Que Maché s'est ainsi fait de graves blessures avec fractures ouvertes multiples du tibia et du péroné, fractures du coccyx lesquelles ont entraîné des douleurs lombaires et sciatiques avec troubles de la marche nécessitant l'intervention d'une tierce personne ;

Attendu que lors des débats ayant abouti à la décision déférée, Maché a soutenu, comme il le fait en cause d'appel, que l'accident était sans rapport avec le risque aérien, qu'il n'était donc pas régi par la Convention de Varsovie, mais qu'il relevait uniquement du droit commun des transports terrestres ;

Que la Cie Air France était donc tenue d'une obligation de résultat sur le fondement de l'article 1147 du Code civil, obligation qui la mettait dans la nécessité de réparer tous les dommages à lui survenus depuis son entrée sur l'aérodrome d'Orly où il avait embarqué jusqu'à sa sortie de l'aérodrome de San Bonet où il avait atterri ;

Qu'une expertise médicale devait être ordonnée pour déterminer les

conséquences de ses blessures et qu'il convenait de lui allouer une indemnité provisionnelle de 40 millions d'anciens francs, à raison des frais considérables qu'il a été conduit à engager pour se soigner ;

Attendu qu'aux prétentions de Maché, la Cie Air France opposait que l'accident s'étant produit au cours des opérations de débarquement, la Convention de Varsovie était applicable, qu'elle faisait valoir que ses préposées n'avaient pas commis de faute et qu'elle reprochait à la victime son inattention ;

Attendu que l'intimée reprend devant la Cour ses conclusions, mais élevant appel incident en ce qui concerne la décision des premiers juges, dans la mesure où celle-ci a écarté l'application des dispositions des articles 20 et 21 de la Convention, demande de plus que Maché soit débouté de son action ;

Attendu que, subsidiairement, elle soutient que sa responsabilité est limitée à 125 000 francs, en vertu des conditions générales du contrat de transport auxquels renvoie le billet d'Air, France utilisé par Maché le jour de l'accident ;

Qu'elle fait plaider, en outre, que la rupture de la dalle engage la seule responsabilité de l'aéronautique espagnole, gestionnaire de l'aéroport ;

Attendu en droit, sur l'application de la Convention de Varsovie, que ce texte dispose, dans son article 17, que le transporteur est responsable du dommage... lorsque l'accident qui l'a causé, s'est produit à bord de l'aéronef ou au cours des opérations d'embarquement ou de débarquement ;

Attendu que la Convention ne précisant pas ce qu'il faut entendre par ces dernières opérations, il convient d'en donner une définition en se référant essentiellement au fondement du régime de la responsabilité institué par cette Convention ;

Attendu qu'il s'induit des travaux préparatoires que la limitation de responsabilité prévue dans ce texte a pour raison d'être la nature particulière du risque aérien et l'impossibilité dans laquelle se trouvaient à l'époque les compagnies aériennes d'assurer leur responsabilité illimitée, sans pratiquer des prix de transports excessifs qui auraient détourné d'elles la clientèle ;

Qu'il suit de là, que si la Convention de Varsovie régit notamment les accidents survenus à terre, au cours des opérations d'embarquement ou de débarquement, c'est uniquement dans la mesure où ces dernières opérations s'effectuent sur l'aire de trafic, c'est-à-dire à un endroit de l'aéroport où les passagers sont soumis aux risques aériens ;

Que la Convention cesse donc de s'appliquer, lorsque ces risques ont disparu, pour faire place au droit commun des transports terrestres qui reprend alors son empire ;

Attendu en fait qu'il résulte, des renseignements et des documents produits, que l'accident litigieux est survenu ainsi qu'il a été dit, non pas sur l'aire de trafic de l'aérodrome, mais à l'intérieur du jardin de la douane, séparé de cette aire par un retour de façade des bâtiments de l'aérogare ;

Qu'il est constant également qu'à ce moment-là, Maché était guidé et dirigé par les préposées d'Air France qui le conduisaient de l'avion dans les bâtiments de l'aérogare où devaient être accomplies les formalités de police et de douane ; qu'il n'était donc pas libre de choisir son itinéraire, mais devait, à cet égard, obéir aux injonctions des préposées de la Cie Air France.

Attendu, en conséquence, que l'accident n'entre pas dans les prévisions de la Convention de Varsovie, mais relève du droit commun des transports terrestres qui, en vertu de la présomption de responsabilité mise à la charge du transporteur, oblige ce dernier à conduire le passager sain et sauf à destination et à réparer, le cas échéant, entièrement les dommages dont il pourrait être victime dans la mesure où le contrat de transport lui-même ne l'exonère pas ou ne limite pas sa responsabilité ;

Attendu sur la clause d'exonération et de limitation de responsabilité insérée au contrat de transport, que le billet de passage stipule au § 2 *b*, sous la rubrique des conditions du contrat de transport ;

« ...dans la mesure compatible avec ce qui précède (règles et limitation de responsabilité établies par la Convention de Varsovie), tout transport effectué et tous autres services rendus par chaque transporteur en vertu de ce billet sont régis par : ..... *la règlementation* et les horaires des transporteurs... lesquels sont réputés faire partie intégrante du contrat de transport et peuvent être consultés dans les bureaux du transporteur et aux aéroports où il exploite des services réguliers... » ;

Attendu que les conditions générales de transports des passagers auxquelles il est ainsi fait allusion, disposent elles-mêmes au § 3 intitulé « limitation de responsabilité » que la responsabilité du transporteur aérien n'est engagée qu'en cas de faute prouvée, et sous condition qu'aucune faute du passager n'ait contribué au dommage ; qu'en toutes circonstances enfin, la responsabilité du transporteur... en cas de blessures... est limitée à 125 000 francs ou à l'équivalent ;

Attendu que cette clause dont la validité n'est pas contestée s'applique, non seulement au transport dans la mesure où celui-ci n'est pas régi par la Convention de Varsovie, mais également à tous autres services annexes, ainsi que cela résulte du libellé même du billet de passage qui précise à ce sujet... tout transport « effectué et *tous autres services rendus* par chaque transporteur en vertu de ce billet, sont régis par... » ;

Attendu sans doute que Maché conteste avoir eu connaissance de cette clause ;

Mais attendu qu'il résulte des déclarations reçues par l'huissier de justice Duquesne que, depuis sa fondation, la Cie Air France a toujours fait procéder, dans tous les locaux accessibles au public, à l'affichage du règlement fixant les conditions de transport des passagers et des bagages, et que le 7 juin 1963 notamment, ces conditions étaient affichées à l'Agence Air France, avenue des Champs-Elysées, à Paris, où l'huissier s'était rendu pour faire son constat, à proximité de l'entrée et à deux mètres du bureau « Renseignements et Informations » ;

Attendu qu'il convient d'observer également que Maché qui est un habitué des transports aériens, d'après les documents produits, ne pouvait ignorer l'existence de cette clause et savait aussi qu'il est conseillé aux passagers qui utilisent comme lui, couramment les lignes aériennes, de souscrire une assurance complémentaire ;

Attendu sur les fautes respectives des parties en cause, que l'inattention reprochée à Maché, pour les motifs sus-énoncés, n'est nullement établie, tandis que l'imprudence de la préposée d'Air France qui a contrevenu aux instructions de la Compagnie, en empruntant un raccourci qu'elle n'avait pas préalablement reconnu, est certaine et se trouve en relation directe avec le dommage subi par l'appelant ;

Attendu qu'il est donc sans intérêt de s'arrêter à la question de savoir s'il aurait dû ou non rechercher la responsabilité de l'aéronautique espagnole, gestionnaire de l'aéroport, puisqu'aussi bien cette dernière avait prévu, en accord avec les compagnies aériennes, un itinéraire de

remplacement que n'a pas suivi l'hôtesse de l'air, et que, de surcroît, le mauvais état de la dalle n'a jamais été reproché à la Cie Air France ;

Attendu qu'en définitive, il convient de décider que Maché est en droit de se prévaloir des dispositions de l'article 1147 du Code civil, avec cette précision cependant que c'est à juste titre également que la Cie Air France peut invoquer la clause de limitation de responsabilité prévue aux conditions générales du transport des passagers ;

Attendu que le montant du dommage subi par Maché est supérieur à cette somme de 125 000 francs or ; que ce fait n'est pas contesté par la Compagnie appelante ;

Qu'il convient, dès lors, nonobstant les motifs inexacts des premiers juges, de confirmer la décision entreprise ;

Par ces motifs :

La Cour :

Ouï les avoués des parties en leurs conclusions, Monsieur le Conseiller Inselin en son rapport, les avocats des parties en leurs plaidoiries, Monsieur l'Avocat Général entendu, et après en avoir délibéré conformément à la loi ;

Reçoit en la forme tant l'appel principal de Maché que l'appel incident de la Compagnie Air France ;

Au fond dit que le jardin de la douane dans lequel s'est produit l'accident corporel survenu à Maché le 29 mars 1958, ne se trouvait pas exposé aux risques de la navigation aérienne ;

Dit en conséquence que la Convention Internationale de Varsovie du 12 octobre 1929 ne s'applique pas à cet accident ;

Dit que la Compagnie Air France est responsable sur le fondement de l'article 1147 du Code civil ;

Dit toutefois que cette Compagnie est en droit de se prévaloir de la limitation de responsabilité prévue par les clauses et conditions générales régissant le contrat de transport qui limite à 125 000 francs or la réparation des accidents corporels survenus aux passagers ;

Confirme en conséquence, mais pour d'autres motifs, le jugement entrepris ;

Condamne la Compagnie Air France, vu sa succombance majeure en tous les dépens de première instance et d'appel, y compris les frais exposés devant la Cour de Paris, à l'exception des frais de l'arrêt cassé.

Président : M. Suquet.
Avocats : Mes Denesle, Pechaud et Garnault.

Exhibit B

TRIBUNAL DE GRANDE INSTANCE DE PARIS (4e Ch. 1re Sect.)

Jugement du 19 février 1973

Dame Forsius c. Cie Air-France

ACCIDENT CAUSÉ AU SOL. — CHUTE D'UN PASSAGER DANS LES COULOIRS D'UN AÉRODROME. — SOL GLISSANT. — ART 17, 20 ET 21 DE LA CONVENTION DE VARSOVIE. — NON-RESPONSABILITÉ DU TRANSPORTEUR.

Est irrecevable la demande d'indemnisation formée par une passagère contre le transporteur aérien, sur l'aéronef duquel elle allait monter, pour blessures consécutives à une chute faite par elle dans les couloirs de l'aérodrome en raison du sol glissant, par application de l'article 17 de la Convention de Varsovie aux termes duquel le transporteur n'est responsable du dommage survenu en cas de mort ou de blessure subie par un voyageur que si l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

En effet, la seule délivrance d'un titre de transport ou son contrôle n'a pas pour effet de rendre actives les obligations du transporteur, et on doit considérer qu'en l'espèce, le contrat de transport n'était pas encore en cours d'exécution au moment où l'accident s'est produit, ce qui rend même inapplicable l'article 1147 du code civil.

Le fait, au surplus, que la cause de l'accident est imputable au matériau particulièrement glissant employé pour la confection du sol dans les couloirs de l'aérodrome est inopposable à la compagnie aérienne qui ne peut ainsi être recherchée d'avantage sous l'angle de la responsabilité quasi-délictuelle.

Le Tribunal,

Attendu qu'un jugement de cette chambre en date du 10 mai 1967 a notamment ordonné une double expertise sur une demande dirigée contre la Compagnie Air France par la dame Forssius à la suite d'un accident dont elle a été victime le 10 octobre 1964 vers 9 h 50, à l'aéroport d'Orly ;

Attendu que Pierre Cevallier, expert, a déposé son rapport au greffe le 4 novembre 1970 et a exposé notamment l'avis que le sol du couloir emprunté par la dame Forssius est revêtu de comblanchien, matériau couramment utilisé à cet usage et qui ne présentait dans la zone considérée et même ailleurs, aucun caractère d'anormalité ni défaut d'entretien, que toutefois les essais effectués ont confirmé nettement et de façon concordante l'impression ressentie subjectivement que le comblanchien est plus glissant que les matières plastiques utilisées en d'autres points de l'aéroport ; qu'enfin la Compagnie Air France n'a pas la charge de l'état du sol et de l'entretien du passage en question qui incombent à l'Aéroport de Paris ;

Attendu que par ailleurs le professeur René Michon a déposé son rapport au Greffe le 19 décembre 1967, qu'il y a émis l'avis que la dame Forssius a subi une incapacité temporaire totale de trois mois, une incapacité temporaire partielle à 25 % de 9 mois, des douleurs modérées, un préjudice d'agrément modéré (piano, golf, clavecin) et une incapacité permanente partielle de 17 %, le tout résultant d'un traumatisme du

poignet droit avec frature de l'extrémité inférieure du radius accompagnée d'une image suspecte de fracture de l'extrémité inférieure du cubitus et laissant persister des séquelles ;

Attendu que la Compagnie Air France demande que la dame Forssius soit déclarée irrecevable en tous cas mal fondée et déboutée puisqu'elle n'avait point la charge de l'état du sol et de l'entretien du passage où la dame Forssius prétend être tombée et qu'elle est exonérée soit par l'article 20, soit par l'article 21 de la Convention de Varsovie ;

Attendu que pour sa part la dame Forssius soutient que la Compagnie Air France est responsable envers elle en vertu du contrat de transport et doit être condamnée à lui payer diverses sommes s'élevant au total à 44 995 F ; qu'elle demande plus précisément qu'il soit dit et jugé que l'accident a eu pour cause l'état du sol et la carence d'Air France qui ne rapporterait pas la preuve d'une faute quelconque de la dame Forssius ;

Attendu que cette dernière sollicite subsidiairement une nouvelle expertise ;

Attendu qu'en application de l'article 17 de la Convention de Varsovie du 12 octobre 1929 promulguée par décret du 12 décembre 1932, en ce qui concerne les dommages corporels subis par les voyageurs l'exécution du contrat de transport aérien ne commence qu'à partir du moment où sont entreprises les opérations d'embarquement et elle cesse dès que les opérations de débarquement sont achevées ;

Attendu que la seule délivrance de titres de transport ou leur contrôle n'a pas pour effet de rendre actives les obligations du transporteur ;

Attendu qu'en l'espèce la dame Forssius qui se préparait à monter dans un avion de la Compagnie Air France à destination de Tunis a glissé sur le sol d'un couloir sous douane au premier étage de l'Aéroport d'Orly, c'est-à-dire dans un lieu utilisé en commun par de très nombreux voyageurs, clients de plusieurs compagnies de navigation aérienne différentes ;

Attendu qu'ainsi le contrat de transport conclu entre la demanderesse et la Compagnie Air France n'était pas encore en cours d'exécution au moment où l'accident s'est produit de sorte que l'article 1147 du Code civil est inapplicable à l'espèce ;

Attendu que l'emploi de tel ou tel matériau pour la confection des sols ou l'entretien de ceux-ci ne regarde que l'Aéroport de Paris qui est un établissement public institué par l'ordonnance 45.2400 du 24 octobre 1945, article premier, autonome et n'est aucunement l'affaire de la Compagnie Air France qui ne saurait ainsi être recherchée davantage sur le terrain de la responsabilité quasi délictuelle ;

Attendu qu'en conséquence la dame Forssius doit être déboutée de ses demandes ;

Par ces motifs,

Statuant contradictoirement,

Déboute la dame Forssius de ses demandes contre la Compagnie Air France ;

Condamne la dame Forssius aux dépens.

Président : M. Thuriet.

Avocats : Me Rault et Garnault.

(E)

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CONSTANTINE EVANGELINOS, CALLIOPPI EVANGELINOS, ERMA EVANGELINOS, STELLA EVANGELINOS, and MARY JULIA EVANGELINOS, Plaintiffs	)	
vs.	)	Civil Action No. 74-165
TRANS WORLD AIRLINES, INC., a corporation, Defendant	)	

OPINION AND ORDER

SNYDER, J.

Callioppi Evangelinos and her children, Constantine, Erma, Stella, and Mary Julia (Plaintiffs) purchased round trip air transportation reservations from Trans World Airlines, Inc., (TWA) from Pittsburgh, Pennsylvania through New York City to Athens, Greece, and return. While the Plaintiffs were awaiting to board return TWA Flight 881 1./ in Athens in the boarding area, the peace and quiet of the scene was broken by a terrorist attack when two armed men threw hand grenades, followed by gunshots fired at random into the crowd. Then the attackers took up a position behind a bar in the Transit Lounge and held thirty-two people as hostages. At approximately 5:20 P.M., after nearly two hours of negotiation with local officals, the terrorists surrendered and were arrested. The toll that afternoon included forty TWA passengers wounded; two TWA passengers died immediately and a third several days later; a passenger of another airline died immediately; four TWA employees were injured; and an

1./ "On August 5, 1973, the security procedures with respect to inspection of passengers and baggage for Flight 881 were administered by the Greek authorities. * * * Two TWA security guards were also present." (Defendant's Answer to Interrogatory No. 19).

undetermined number of passengers and employees of other airlines were wounded. The Plaintiffs herein were severely wounded by shrapnel or bullets.

Suit was brought against TWA on absolute liability based upon the Warsaw Convention as modified by the Montreal Agreement, and alternatively for negligence.

The Plaintiffs have filed a Motion for Partial Summary Judgment on the issue of absolute liability. Defendant has also moved for Summary Judgment on that issue of liability and opposes Plaintiffs' Motion.[2./]

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331.[3./]

There is no genuine issue with respect to the basic facts which underlie the incident. TWA was engaged in the international air transportation of passengers and personal property between New York City, New York, and Athens, Greece. Both the United States and Greece are signatories to the Warsaw Convention, more formally known as "A Convention for the Unification of Certain Rules Relating to International Transportation by Air"[4./], and TWA is signatory to the

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2./ The cause of action based on negligence is not in issue on the instant Motions for Summary Judgment.

3./ 28 U.S.C. §1331 provides as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

4./ For a thorough review of the Convention see the excellent discussion by Judge Wisdom in Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir., 1967), cert. denied 392 U.S. 905(1968).

Montreal Agreement,[5] more particularly discussed hereinafter.

On August 5, 1973, the Plaintiffs were driven to the Athens Airport by a relative and arrived at about 2:00 P.M. They reported to the check-in counter in the departure hall on the upper level, where their luggage was checked, ticket coupons were submitted and boarding passes were issued by TWA employees. They then proceeded to an area on the same level where their boarding passes and tickets[6] were checked and examined by the police and then they reported to passport and currency control where their passports were examined and stamped. They then proceeded down a set of stairs into the Transit Lounge on the lower level, entrance to which is restricted to passengers ticketed and scheduled to depart on international flights of the forty scheduled carriers operating out of the terminal and to other personnel, who are not passengers, needed to service the area. Gates 4 and 5 were normally used by TWA for their outgoing flights. The Transit Lounge was not partitioned into exclusive areas. The Plaintiffs went to the Transfer Desk in the Transit Lounge area where they obtained a seat assignment and then awaited the announcement of the boarding of their flight in order to report to Gate 4. At this Gate, there are two separate lines, one for males and one for females, where there is a handbag search and a physical search made by the Greek Police. There are tables for examination of hand luggage and behind the tables were located two booths for physical search of all persons intending to depart. After the search, passengers would proceed through double doors out of the

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5./ Civil Aeronautics Board Agreement 18900, Order Serial No. E-23680, May 13, 1966.

6./ The tickets contained the "Advice To International Passengers on Limitation of Liability" and the "Notice" which read in pertinent part as follows: "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. . . ."

Transit Lounge where they boarded buses for transportation to the aircraft stationed at some distance from Gate 4.

The Transfer Desk (where the seat assignments were handed out) was manned by TWA personnel, as well as employees of the other airlines that used the terminal. Two TWA Security Guards were stationed at Gate 4 as well as at least two passenger service personnel of TWA. After being physically searched, the passengers would have walked to two sets of exit doors which led from the Transit Lounge to a raised terrace attached to the terminal building. Two sets of stairs were located on the east side of the terrace leading to a waiting area where there was a bus operated by Olympic Airlines and intended to carry persons across the traffic apron a distance of approximately 250 meters to where the airplanes were parked for loading.

At the time of the attack, all eighty-nine passengers scheduled to board TWA Flight 881 had checked in and received their boarding passes. The Plaintiffs had completed the various steps required and began to queue up in two lines preparatory to proceeding through the hand baggage and physical searches. At the same time, there was being prepared, Flight 806 destined for Tel Aviv, and the Tel Aviv passengers were taken out of the Gate 4 lineup (the electrically controlled sign having erroneously shown Flight 806-Tel Aviv instead of Flight 881-New York) 7./ These passengers were then

7./ At approximately 2:55 P.M., Athens local time, the boarding of TWA Flight 840, a flight through Athens to Tel Aviv had been completed with 121 passengers joining the flight at Athens and 21 through passengers on board. Due to the late arrival of the inbound aircraft, Flight 840 was in a multiple landing operation with Flight 806, another TWA flight through Athens to Tel Aviv, and also with the originating flight 881, a flight originating in Athens to New York. All three vehicles were parked on the traffic apron as shown at no. 19, Diagram A to the Enright Report.

15 passengers were then boarded on Flight 806 including a party of ten connecting passengers originally booked on Flight 840 who had arrived late and were being protected on Flight 806, that is, placed on a substitute flight going to the same destination. At approximately (cont.)

taken through Gate 5 where Swiss Air had just completed boarding of another flight.

Approximately seven Flight 881 passengers had departed through Gate 4, exited the Transit Lounge, and had either boarded or were about to board the bus previously referred to. The great majority of the eighty-nine scheduled passengers for Flight 881 were in line in front of the tables at Gate 4 at the time of the incident. The Plaintiffs were injured while being queued up in line in front of Gate 4 while waiting to be searched.

In statements made later to the police, the terrorists admitted that they had planned to attack "Israel immigrant passengers on TWA Flights going to Tel Aviv, but by mistake struck when the passengers were actually boarding the New York bound flight." They acknowledged membership in a Black September Terrorist Organization and were seeking international publicity.

Footnote 7 continued/ 3:00 P.M., a TWA ground hostess made an announcement over the loud speaker system that all persons awaiting Flight 881 were to proceed to Gate 4 which was located as shown on Exhibit B to the Stipulation. After this announcement, passengers, including plaintiffs, scheduled to board Flight 881 began to queue up in two lines, preparatory to proceeding through hand baggage and physical search. Upon hearing this announcement, Greek Airport personnel in another part of the building electroncially changed the sign board over Gate 4 from 'TWA Flight 806 Tel Aviv' to 'TWA Flight 881-New York'. At that point, Marina Mastroyanni, a TWA customer service agent, who had been told that there were two transit passengers missing from Flight 806, bound for Tel Aviv, came to the transfer desk and made the announcement over the loud speaking system, 'immediate boarding of TWA Flight 806 to Tel Aviv at Gate 4.' Upon hearing this announcement, the airport personnel changed the sign over Gate 4 to read 'TWA Flight 806-Tel Aviv.' Miss Mastroyanni indicated at the time she made this announcement that she was missing two transit passengers from Flight 806 who had deplaned, apparently to go to the duty free shop. After making the announcement at the transit desk, Miss Mastroyanni returned to Gate 4 and asked the passengers who had been queued up there for Flight 881 if any of them were Tel Aviv passengers. She took three passengers out of line who were bound for Tel Aviv and took them to Gate 5 where Swiss Air had just completed boarding of a flight and she checked these Flight 806 passengers through Gate 5." (Memorandum of Plaintiffs in Support of Motion for Partial Summary Judgment, pp. 7 and 8).

The flight finally departed for New York carrying only the seven passengers who had completed clearance before the incident and were available when the local police released the aircraft at 5:30 P.M. Athens time.

THE WARSAW CONVENTION

(400 Stat. 3000, 49 U.S.C.A.§1502(Note))

In 1934, the United States became a party to the Warsaw Convention, a treaty subsequently signed by one hundred and seven nations, applying to "all international transportation of persons . . . performed by aircraft for hire. . . ."[8./] (Article 1(1)).

It is clear that the overall objective of the Warsaw Convention was to provide uniform rules relating to air transportation documents such as tickets, baggage checks and air waybills, and to limit the air carrier's liability for an airplane accident. Article 17 of the Convention provides:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (Emphasis supplied).

Article 22 of the Warsaw Convention limited damages to the maximum amount of $8,300 per passenger, thus limiting the amount of recovery that an injured or wounded passenger could secure on an international flight.

8./ The Warsaw Convention was signed by the representatives of 23 countries at Warsaw, Poland on October 12, 1929, and on October 29, 1934 President Roosevelt proclaimed adherence after the United States Senate had advised adherence on June 15, 1934.

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On November 15, 1965, the United States formally denounced the Warsaw Convention because of its dissatisfaction with the damage limitation of $8,300, feeling this was unduly prejudicial to American citizens travelling abroad on international flights.[9./] Cancellation of United States' participation was to take effect May 15, 1966, but one day before that time the United States withdrew its notice of cancellation as a result of numerous meetings which resulted in an increased limit of liability and was known as the Montreal Agreement. This Agreement between the air carriers, which was signed by TWA and approved by various governmental bodies, including the United States through its Civil Aeronautics Board[10./], provides:

> "(1) The limit of liability for each passenger for death, wounding or other bodily injuries shall be the sum of U.S. $75,000 . . . "
>
> "(2) The carrier shall not . . . avail itself of any defense under Article 20(1). . ."

Previous Article 20(1) had provided that a carrier could have a defense that it:

> " . . .ha[d] taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Thus, the Montreal Agreement,as here applicable, waived limitations in the Warsaw Convention and agreed to the increased liability of $75,000 for each passenger, waived the defense it might have under Article 20(1) and accepted absolute liability, provided the transportation was international in scope and involved a location within the United States. (See 32 Journal of Air Law and Commerce, 243

9./ Department of State Press Release No. 268, November 15, 1965; See New York Times, November 16, 1965 (City Edition), p. 82, column 1.

10./ Approved by the Civil Aeronautics Board, May 13, 1966, Order E-23680, 31 Fed.Reg. 7302 (1966).

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(1966)). Clearly, the Montreal Agreement imposed liability on carriers for damages caused under circumstances beyond their control such as sabotage and hijacking. See 80 Harvard Law Review, 497, 560 (1967) and Husserl v. Swiss Air Transport Co., Ltd., 351 F.Supp. 702 (S.D.N.Y. 1972), aff'd 485 F.2d 1240 (2d Cir. 1973).

DISCUSSION

Defendant TWA contends that the Warsaw Convention does not apply for the Plaintiffs here because they were not injured while "on board the aircraft or in the course of any of the operations of embarking or disembarking", because they were inside the terminal building.

The precise meaning of the terms of any statute or treaty is a question of law. Todok v. Union State Bank, 281 U.S. 449 (1930); McDonald v. Air Canada, 439 F.2d 1401 (1st Cir. 1971); Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 392 (1974). The scope or substance of the carrier's liability under the treaty must be determined from an examination of the "four corners of the treaty" (American Trust Company v. Smyth, 247 F.2d 149, 153 (9th Cir. 1957)), keeping in mind the purpose of the contracting parties. Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 679 (2d Cir. 1957); Rosman v. Trans World Airlines, Inc., supra. Cf. United States v. Belmont, 301 U.S. 324, 331-332 (1937).

This is further brought out by Article 23 of the Warsaw Convention which states:

> "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and

void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

It is not helpful to look at whether or not the airline would have been liable at common law for injuries or accidents occurring under the circumstances here, as contended for by the Plaintiffs. To the contrary, we look to the Convention. As stated by both parties, the Montreal Agreement did not and could not change the terms of the Convention. The latter agreement among several airlines raised the liability limit in accordance with Article 22 (1) of the Convention and waived the defense of due care as provided for in Article 20(1). Rosman v. Trans World Airlines, Inc., supra; McDonald v. Air Canada, supra. Nor was there any attempt by the Montreal Agreement to limit the application of "an accident" as defined in Article 17 of the Convention to exclude the criminal act of a third party. See Husserl v. Swiss Air Transport, supra.

It is the well established practice of the courts in this country to look to the legislative history of a treaty. Choctaw Nation v. United States, 318 U.S. 423 (1943); Factor v. Laubenheimer, 290 U.S. 276 (1933); Cook v. United States, 288 U.S. 102 (1933). And specifically with respect to the Warsaw Convention, a federal court has stated "the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention." Block v. Compagnie Nationale Air France, supra, 386 F.2d at 336.

As we do so, we note that in the working draft that was before the delegates as they met in Warsaw in October of 1929, it

was provided:

> "The period of carriage for the application of the provisions of the present chapter, extend from the time when the passengers, goods or baggage enter the airport of departure until the time when they exit from the airport of arrival; it does not cover any carriage whatsoever outside the limits of an airport, other than by aircraft".
> (Translation from the French; Michael Riffaterre, Professor and Chairman of the Department of French and Romance Philology at Columbia University; Article 20, Paragraph 1 of the Comite International Technique d'Experts Juridiques Aeriens).

Apparently, the delegates had little trouble agreeing that liability should attach inside the terminal building in the case of goods and baggage, but there was extensive debate on that principle as regards passengers. Rosman v. Trans World Airlines, Inc., supra. The New York State Court of Appeals noted that"[t]he minutes of the Convention indicate that the debate over this article [17] centered around the issue of when the air carrier's liability for damage to passengers should begin and end rather than the scope of compensable injuries." Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385,395 n. 10, 314 N.E.2d 848, 854 n.10, 358 N.Y.S.2d 97, 105 n.10 (1974). When the Draft Article was voted upon, it was rejected by the delegates. (Warsaw Minutes at 57). The Article was then sent back to the drafting committee and apparently at the suggestion of the French delegate, Mr. Ripert, Draft Article 20 was split into two separate articles; Article 17 for passengers and Article 18 for goods and baggage. (Warsaw Minutes at 136).

Article 18, relating to goods and baggage, contained the basic system originally provided for in Draft Article 20;it provided for liability "if the occurrence which caused the damage so sustained took place during the transportation by air." "Transportation by

air" was defined as comprising "the period during which the baggage and goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of landing outside an airport, in any place whatsoever."

Article 17, as we have seen, related only to passengers and covered the damages, "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (Emphasis added).

Amadeo Giannini, the Italian Delegate to the Conference, later wrote, concerning the change in language, that "in this way, the grave and unjustifiable rule proposed by C.I.T.E.J.A. 11./ to have liability commence at the moment of entry into or exit from, respectively, the airport of departure or arrival, is eliminated." (Translation from the Italian; Giannini, Saggi di Diritto Aeronautico, p. 233 (1932)).

At the Fifth International Conference on Air Navagation held at The Hague in 1930, D. Goedhuis (later President of The Hague Convention) presented a paper in which he stated:

> ". . . , art. 17 mentions 'embarquement' and 'debarquement'. The question is how to explain these words? There are two views viz: a) in a broad sense: i.e. the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building; b) in a narrow sense, i.e.: the getting on board and the alightment only comprise the actual getting in and out of the aeroplane."

11./ Comite International Technique d'Experts Juridiques Aeriens.

Mr. Goedhuis, during the discussion which followed, stated that he favored "a broad interpretation. . . to cover passengers going from the terminal building to the plane and vice versa." Others, including Dr. W. Muller, President of the Congress Legal Section and the Dutch Delegate to the Warsaw Conference, supported a narrow view which covered the time when the passengers were actually boarding the aircraft. (Fifth Congress, at p. 1173).

From these discussions it is apparent to the Court that the delegates were defining geographical limits rather than an activity when they used the words, "any operations of embarkation". In any event, even under the broadest of the two positions outlined by Mr. Goedhuis, the Plaintiffs in this case were not within the "operations of embarkation".

We are confronted immediately with Judge Brieant's decision in Day v. Trans World Airlines, Inc., 73 Civ. 4105-CLB, S.D.N.Y. (1974), in an opinion entered March 31, 1975 in which he allowed recovery in suits involving two survivors and one decedent from this same incident who were in the same waiting line to board Flight 881. He very incisively sets forth his interpretation of the "operations of embarkation" as follows (at p. 10):

> "A consideration of the plain meaning of the words 'in the course of any of the operations of embarking' produces a single conclusion. These passengers could not board the aircraft unless they:
>
> 1. presented their tickets to TWA at the checking desk on the upper level;

2. obtained boarding passes from TWA;

3. obtained baggage checks from TWA;

4. obtained an assigned seat number from TWA;

5. passed through passport and currency control imposed by the Greek Government;

6. submitted to a search of their persons for explosives and weapons by Greek police;

7. submitted their carry-on baggage for similar inspection by Greek police;

8. walked through Gate 4 to Olympic's bus;

9. boarded the bus;

10. rode in the bus a distance of 100 yards; and

11. walked off the bus and onto the aircraft.

There is simply no other way to 'embark,' except by these eleven steps. None of these pursuits above-named were being conducted for the personal convenience of the passengers, nor did any of them constitute frolic and detour. When they were injured they had completed five out of eleven steps, each absolutely essential. Without any one, a passenger could not 'embark' upon the aircraft.

Of course, when the Convention was drafted, we lived in a simpler day. Many airlines required nothing more than to weigh the passenger and his luggage, take his ticket and allow him to place his foot on the boarding ladder. The plain meaning of the treaty must be adaptable to the practical exigencies of air travel in these parlous times. Regardless of whose real estate he was standing on at the time of the terrorist attack, under the circumstances of this case, any person who had accomplished as many as five out of the above mentioned eleven essential acts without which it would be impossible to travel on the flight, within an uninterrupted time sequence, and was perforce lined up to perform the balance of the required acts sequentially, is within the plain meaning of the clause above quoted. TWA would have refused to carry any passenger until he completed substantially all of the above-enumerated acts in the order listed."

The great difficulty with Judge Brieant's opinion, as this Court views the matter, is that it extends the liability of the

signatories to the Montreal Agreement under the Warsaw Convention far beyond anything that was within the contemplation of the parties. This, the Court does not feel justified in doing.

The Defendant has cited in support of its position here, the same cases that were cited to Judge Brieant and which Judge Brieant primarily distinguished on the basis that they involved disembarkation. McDonald v. Air Canada, supra; Felismina v. Trans World Airlines, Inc., 13 Aviation Law Reporter 17-145 (S.D.N.Y. 1974); Klein v. KLM Royal Dutch Airlines, Appellate Division 2d - (2d Dept. 1974), New York Legal Journal, October 23, 1974 at p. 21, col. 4; Mache v. Air France, [1967] Revue Francaise de Droit Aerien 343, 345 (Cour d'Appel de Rouen 1967), aff'd [1970]. It will be noted, however, that many of the steps involved in embarkation, as outlined by Judge Brieant in Day, are just as essential, although in reverse, to the steps one must take in disembarking. Thus, it is obvious that in disembarking from the plane, passengers must either come down the steps from the plane or go on the jetway to the terminal building. They may then, as was the situation in the instant case, be required to board a bus, but in any event, they would then enter the terminal building and be subjected to inspection by the government of entry. At this point, we believe, they must be deemed to be beyond the scope of the carrier's liability.

In McDonald, supra, a disembarking passenger had left the airplane, left the carrier's area and had arrived in the common terminal baggage area. Subsequently, she was found on the floor, but no testimony was presented to describe the cause of her fall.

The Second Circuit found the airline was not liable because negligence had not been proven, nor was an "accident" proven, but rather a fall from some internal condition. By way of dicta, the Court stated it would seem that a passenger could not recover for events occurring after he "has reached a safe point inside of the terminal, even though he may remain in the status of a passenger of the carrier while inside the building." (Emphasis added). The Court went on to say, "without determining where the exact line occurs, it had been crossed in the case at bar." (439 F.2d at 1405). The rationale of the Court had to do with the operation of disembarking (activity) as being terminated by the time the passenger descended from the plane and reached a safe point inside the terminal, "far removed from the operation of the aircraft"; not just that she had reached the terminal building.

In Felismina, supra, plaintiff was disembarking and had walked through an expandable horizontal jetway which led from the airplane door to the "terminal proper", and walked through the long approach ramps at Kennedy Airport into a small room on the upper floor of the terminal. She was injured as she stepped onto the down escalator leading to the lower level of the terminal where health, immigration, baggage claim, and customs were situated. TWA attempted to apply the Convention to that situation because of a shorter statute of limitations. The Court found that the Warsaw Convention did not apply as, "that by the time plaintiff boarded the down escalator, she had disembarked from defendant's aircraft." It was clear that Felismina was not in the act of disembarking, since she had entered on the down escalator leading to the lower level where the baggage claim and customs were situated. She was well

beyond the scope of disembarkation.

In Klein, supra, again the plaintiffs had gotten off the aircraft and had arrived safely within the terminal building at Lod Airport, Israel. The Court simply held that they had disembarked "within the meaning of Article 17 of the Warsaw Convention." (Cf. McDonald v. Air Canada, supra.)

In Mache, supra, the plaintiff was led by two stewardesses across the traffic apron from the plane toward the terminal building. Because of construction work, he had to take a shortcut through the customs garden which was not on the traffic apron proper but off to the side and outside of the terminal building. While crossing the customs garden, which while not part of the traffic apron was on the same level, plaintiff sustained an accident. The Court held that the Warsaw Convention did not apply; as disembarking had been accomplished: "it is only to the extent that these operations are taking place on the traffic apron" that the Convention would apply.

Here as well, we believe, when the passengers were waiting in line to proceed to the last gate of the terminal, they were not within the "operations of embarkation", and that as a matter of law, the Plaintiffs' injuries in the matter sub judice were not incurred as a result of an accident actionable under the Warsaw Convention as supplemented by the Montreal Agreement.

The Plaintiffs' Motion for Summary Judgment on the issue of liability is denied; Defendant's Motion for Summary Judgment dismissing the claim is granted.

This Court recognizes that the issue of liability is one of first impression as far as our Circuit and the Supreme Court of the United States are concerned. An immediate appeal from the Order to be entered herein can materially advance the termination of this case and will be granted if so requested.

An appropriate Order will be entered.

O R D E R

AND NOW, to-wit, this 12th day of June, 1975, after due consideration of the Motions for Partial Summary Judgment filed by both parties, as well as the arguments and briefs of counsel, IT IS ORDERED, ADJUDGED AND DECREED that in accordance with the reasons set forth in the accompanying Opinion:

1. Plaintiffs' Motion for Partial Summary Judgment on liability under the Warsaw Convention be and the same is hereby denied.

2. Defendant's Motion for Partial Summary Judgment on liability as to the application of the Warsaw Convention be and the same is hereby granted.

David J. Snyder III
UNITED STATES DISTRICT JUDGE

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Exhibit 2-4
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KREINDLER & KREINDLER